

DEPARTMENT OF HOUSING
AND COMMUNITY AFFAIRS
03 JUL 15 PM 1:45
ES
CONSUMER AFFAIRS
RECEIVED

Case 599-G

The facts are not in dispute. Mr. Lopes constructed a fence, a storage shed and extended the concrete patio in his yard, all without approval of the Board or the ACC. On April 30, 2002, the Board, acting through its management company, wrote Mr. Lopes indicating that they had been informed that construction was taking place in his yard without an application filed seeking approval for the changes. In a letter dated May 3, 2002, Mr. Lopes apologized “for not having submitted an application.” He described the work as replacing the fence, extending the existing

patio with “a larger concrete patio covered with Arizona flagstone” and “building a small board on board tool shed The shed will extend approximately 12-16" above the 6' fence line and will be finished to blend in with new fence [sic].”

The board treated the May 3 letter as an application for the changes and on May 16, 2002, approved the work on the fence and the patio but denied permission for the shed. The Board gave Mr. Lopes until June 30 to remove the shed. On June 26, 2002, the Association notified Mr. Lopes that it scheduled a formal hearing regarding the shed.¹ Mr. Lopes attended the hearing on July 9, 2002. In a letter dated July 15, 2002, the Board notified Mr. Lopes of its decision.

[A]fter reviewing the governing documents of the community over and over again, the Board simply could not find a way to make an exception for the shed that you have constructed. It is a blatant violation of the documents and no matter how hard we tried, we could not find a solution that would satisfy the provisions in the documents and still allow you to keep the structure on your property. Therefore, the Board voted that the structure and the slab on which it stands needs to be removed. As we discussed at the hearing, this shed is a dangerous precedent setting issue and if any exception was made for your shed, the Board would be required to allow other types of sheds which we know may not be as aesthetically pleasing as yours. For this reason, the Board voted to uphold the provision in the documents so that it would not be forced to allow additional structures at other properties.

July 15, 2002, Letter, Commission Exhibit (CE) 1 at page 10.

On September 19, 2002, Plyers Mill filed a Complaint with the Commission on Common Ownership Communities. The Complaint and its attachments indicated that Mr. Lopes was in violation of Article VI, section 5 of the Declaration of Covenants, Conditions and Restrictions. CE 1 at page 7. That provision addresses the prohibition regarding temporary structures used as a residence. After Mr. Lopes pointed out, in his response to the Commission dated October 22,

¹ While drafting the panel’s decision, the panel chair noticed that the Board held a hearing prior to the date given to Mr. Lopes for compliance. While this did not enter into the panel’s deliberations and has no impact on the decision, it is somewhat troubling that the Board established a compliance date but proceeded with the enforcement effort prior to that date.

2002, that his shed was not used as a residence, CE1 at page 101, the Board responded that Article VI, section 1 is the Declaration provision governing the dispute, CE 1 at page 108.

On March 26, 2003, Mr. Lopes wrote to the Commission indicating that he “demolished and removed the structure.” On April 9, 2003, the Board responded to Mr. Lopes indicating his yard had been inspected and it found that the shed had not been completely removed, as indicated, but rather it had only been reduced in height. On April 10, 2003 the Board wrote the commission indicating it wanted to proceed with the hearing. The hearing took place on April 23, 2003.

FINDINGS OF FACT

1. Virgilio Lopes, respondent, is a homeowner residing at 10604 Georgia Avenue, Silver Spring, MD 20902. This residence is located in the Plyers Mill Crossing Homeowners Association.
2. The Plyers Mill Crossing Homeowners Association is a community located in Silver Spring, Maryland. The community is governed by Articles of Incorporation, Bylaws, and a Declaration of Covenants, Conditions and Restrictions.
3. Mr. Lopes extended the patio and constructed a fence and a shed in his yard without approval from the Plyers Mill Crossing Homeowners Association. Mr. Lopes does not use the shed for commercial purposes.
4. Plyers Mill gave Mr. Lopes permission, after the fact, for the fence and the patio extension.
5. Mr. Lopes lowered, but did not completely remove, the shed he constructed without permission. The shed that Mr. Lopes constructed, as it currently exists is a temporary structure that is removable
6. With approval, Plyers Mill allows residents to place large plastic “Rubbermaid” type storage sheds in back yards which must be removed when a resident moves.

CONCLUSIONS OF LAW

1. The Plyers Mill Declaration of Covenants, Conditions And Restrictions is a valid and

enforceable document. Markey, et al. v. Wolf, et al., 607 A.2d 82, 87 (Md. 1992). The relevant provision of the Declaration that governs this dispute is Article V, Architectural Control.

2. Article V, Architectural Control, gives the Homeowners Association the authority to regulate and approve or disapprove changes in the community. Furthermore, the board has the authority to require a homeowner to submit an application seeking approval for the erection and/or construction of any "building, fence, wall or other structure."
3. Article VI, Section 1, the provision Plyers Mill relies on for the authority to deny the shed, is not applicable to this dispute. Article VI, Section 1 is a prohibition on the use of property for commercial purposes.

DISCUSSION

Mr. Lopes extended the patio and constructed a fence and a shed in his yard without the approval of the Plyers Mill Crossing Homeowners Association. The Association's rules clearly require such an application. "All changes . . . proposed by a unit owner to exterior appearance, exterior structural elements, or landscaping shall be submitted in writing to the Architectural Chairperson for approval." Community Handbook at 5, CE at 63. Mr. Lopes actions violated the community's Declaration and rules.

Plyers Mill understood that although the fence and patio extension were constructed without authority, requiring removal of items that would have been approved had an application been timely filed is not in the best interest of the community or the homeowner. Plyers Mill wisely allowed Mr. Lopes' fence and patio to remain.

However, Plyers Mill denied permission for Mr. Lopes to keep the shed he constructed and ordered him to remove it. Although he indicated that he totally removed the shed, Mr. Lopes only decreased the size. Mr. Lopes testified that the remaining shed is a temporary structure and can be removed easily. There was testimony from members of the Board that the community allows plastic "Rubbermaid" type storage sheds, upon application. The approval for these plastic storage sheds contains a proviso that the shed must be removed when the resident who requested approval for the shed leaves the community. When asked during the hearing to explain the difference between the "Rubbermaid" shed and Mr. Lopes' shed, other than the material from which each is constructed, the Board indicated there was none. In its rules, the Board could have limited the allowable sheds to a specific type, size or material. The Association may promulgate

a rule governing future shed installation within the community. However, Plyers Mill has no rules or regulations addressing the question at this time.

The Panel does not condone Mr. Lopes' actions in constructing the fence, patio and shed without approval; and the panel is troubled by his misleading statement regarding the removal of the shed. However, considering the Association's lack of rules regarding what storage facilities it will allow within the community, and considering that Plyers Mill allows what it called the "Rubbermaid" shed, the panel finds that Plyers Mill's denial of Mr. Lopes' shed was arbitrary and capricious.

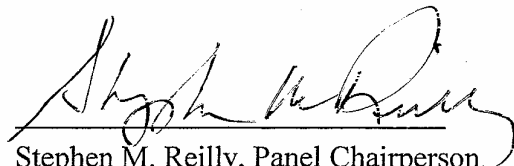
ORDER

In view of the foregoing, and based on the record, for the reasons set forth above, the Commission finds:

Mr. Lopes may keep the shed. The size of the shed is limited to the reduced size as it existed on the date of the hearing. Mr. Lopes must remove the shed when he moves from this residence. Each party is responsible for its own costs associated with this action. Should Plyers Mill desire to regulate storage sheds within the community, it may do so by promulgating a rule addressing the sizes, styles, materials and other limitations it finds acceptable. Such a rule will not alter the ruling of this panel regarding Mr. Lopes' shed.

The foregoing was concurred in by panel members Bruce, Huggins and Reilly.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.


Stephen M. Reilly, Panel Chairperson
Commission on Common Ownership
Communities